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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. ~~1031~~ 148

Estate of EDWARD F. PIPE, Deceased,
NETTIE M. PIPE, Executrix,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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IN THE

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No.

ESTATE OF EDWARD F. PIPE, Deceased,
NETTIE M. PIPE, Executrix,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Second Circuit, entered on February 7, 1957.

Opinions Below.

The opinion of the Tax Court of the United States is reported at 23 T. C. 99.[1] The opinions of the Court of Appeals are reported at 241 F. 2d 210 and are printed in Appendix A, *infra*, p. 12.

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[1] See, record as printed for the use of the court below, pp. 31-40.

Jurisdiction.

The Judgment of the Court of Appeals was entered on February 7, 1957. (R. 62). Petitioner's timely Petition for Rehearing was denied on March 4, 1957. (R. 69). The jurisdiction of this Court is based on 28 U. S. C. §1254(1).

Question Presented.

Does decedent's bequest of his residuary estate to his widow for life with full power to use, enjoy, sell or dispose of the income and principal thereof during her life in her uncontrolled discretion meet the conditions of Section 812(e) of the Internal Revenue Code of 1939 so as to qualify for the marital deduction for Federal estate tax purposes?

Statute Involved.

Section 812(e) of the Internal Revenue Code of 1939, Act of February 2, 1939, c. 2, §812, 53 Stat. 123, as added by Section 361(a) of the Act of April 2, 1948, c. 168, 62 Stat. 117, 121, 26 U. S. C., 1952 ed., §812.

The relevant subsections are printed in Appendix B, *infra*, p. 23.

Statement.

Petitioner filed a petition with The Tax Court of the United States for a redetermination of a deficiency in Federal estate tax set forth in a notice of deficiency issued by the respondent. The jurisdiction of that Court was based on 26 U. S. C. §1101. The following facts were before the Tax Court:

Edward F. Pipe, who died a resident of White Plains, New York on September 20, 1948, was survived by his widow who became Executrix of his estate. The estate tax return was filed with the Collector of Internal Revenue for the Fourteenth District of New York.

The will which was admitted to probate November 10, 1948, after devising to his wife all real property absolutely and forever, together with certain personal effects, provides in part:

> THIRD: All the rest, residue and remainder of my estate, of whatsoever nature and wheresoever situated, hereinafter referred to as my "residuary estate", I give, devise and bequeath to my wife, NETTIE M. PIPE, to have and to hold the same for the term of her natural life, with full power to use, enjoy, sell or dispose of the income and principal thereof, or any part thereof for such purposes or in such manner as she in her uncontrolled discretion may choose, it being my desire to place no restraint on her in any respect concerning the absolute right of full disposition and use of the whole or any part of said income or principal of my residuary estate, except that she shall have no power over the disposition of such part thereof as remains unexpended at the time of her death.
>
> I direct that my said wife shall not be required to file any bond or other security for the protection of any remainderman interested in my said residuary estate, and she shall not be limited in investing and reinvesting the same to securities of the kind authorized by law for the investment of trust funds. During the life of my said wife, any stocks, bonds or other securities may be registered in the name of my said wife alone as if she were the absolute owner of such property, and no one dealing with her with respect to my residuary estate shall be responsible for the application of any proceeds of sale or other disposition of property.

> FOURTH: On the death of my said wife * * * I give and bequeath all * * * of the property which can be identified at my wife's death as a part of my residuary estate * * * absolutely, to [certain named legatees].

The value at the optional valuation date of the property passing under Article THIRD of the will was $217,429.84, all of which was included in the gross estate by the respondent in his notice of deficiency.

The Tax Court held that the decedent's bequest of his residuary estate to his widow did not meet the conditions of Section 812(e) of the Internal Revenue Code of 1939 so as to qualify for the marital deduction. The Court of Appeals affirmed, Circuit Judge Swan dissenting with opinion.

REASONS FOR GRANTING THE WRIT.

1.

The court below has erroneously decided an important question of federal estate tax law which has not been, but should be, settled by this Court.

a. The Decision of the Court Below Conflicts with the Object and Policy of Congress in Enacting the Marital Deduction Provision.

The object and policy of the marital deduction provisions was to equalize the federal estate tax between married couples residing in common law states and those residing in community property states.[2] The intent was to extend

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[2] Sen. Rep. No. 1013, 80th Cong., 2d Sess., pp. 26-28 (1948), 1948-1 Cum. Bull. 285, 303-305; *Awtry's Estate* v. *Com'r.*, 221 F. 2d 749, 760 (8th Cir. 1955); *Weyenberg* v. *United States*, 135 F. Supp. 299, 301 (E. D. Wis. 1955); *Hamrick* v. *Pitts*, 135 F. Supp. 835, 837 (W. D. S. C. 1955), aff'd 228 F. 2d 486, 490 (4th Cir. 1955). See, also Judge Swan's dissenting opinion in the instant case, 241 F. 2d 210, 214 (Appendix A, *infra*, p. 19).

community property treatment to all cases where the one-half of the property which passed to the surviving spouse free of estate tax in the estate of the spouse first to die would (if not consumed or disposed of) be subject to estate tax in the estate of the spouse last to die. For this purpose the Congress in §812(e)(1)(F) of the 1939 Code[3] devised a special type of marital deduction trust under which taxation in the estate of the spouse last to die was insured by the requirement that such spouse must have a power to appoint the corpus either to herself or to her estate.[4] Under §811(f) possession of such a power, whether exercised or not, renders the property subject thereto includible in the taxable estate of the holder of the power.

In discussing this marital deduction trust provision, the Senate Finance Committee Report stated:[5]

> "These provisions have the effect of allowing a marital deduction with respect to the value of property transferred in trust by or at the direction of the decedent, *where the surviving spouse, by reason of her right to the income and a power of appointment is the virtual owner of the property.* This provision is designed to allow the marital deduction for such cases *where the value of the property over which the surviving spouse has a power of appointment will (if not consumed) be subject to either the estate tax or the gift tax in the case of such surviving spouse.*" (Italics supplied.)

The Court below held that an unlimited power to invade or dispose of corpus held by a legal life tenant, even though the bequest to her created a trust under the appli-

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[3] Appendix B, *infra*, p. 24.

[4] Treasury regulations defined the term "power of appointment" to include a power in a beneficiary of a trust "to appropriate or consume the principal" thereof. Regs. 105, §81.24.

[5] Sen. Rep. No. 1013, 80th Cong., 2d Sess., Part 2, p. 16 (1948), 1948-1 Cum. Bull. 331, 342.

cable local law,[6] was not the equivalent of a similar power held by the income beneficiary of a trust under which a third party was appointed trustee. It reasoned that the property which the life tenant did not consume or dispose of would continue to be held in trust for the named remaindermen and that, therefore, the life tenant did not have power to appoint the entire corpus to herself free of the trust as required by the statute.[7]

The rights of a legal life tenant possessed of the unlimited *inter vivos* power which Mrs. Pipe had are, from a practical point of view, no different from those of a surviving spouse having a similar power under a marital deduction trust where a third party is the trustee. In the latter case the surviving spouse can terminate the trust, in part or in whole, at will and do what she likes with the property including bequeathing it by her will. Mrs. Pipe can give away all or any part of the property or transfer it to a trust reserving the income for life with remainder to anyone she pleases. If she creates a revocable trust she is exercising what, in effect, is the equivalent of a power to bequeath.

Under these circumstances we submit that such differences in the method of exercising the power are wholly unimportant and are clearly insufficient to call for the technical construction of the statute applied by the Court below which, on the basis of canons of statutory construction laid down by this Court, is properly rejected in the well reasoned dissenting opinion of Circuit Judge Swan.[8]

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[6] In this case, that of the State of New York. See, *Smith* v. *Van Ostrand*, 64 N. Y. 278 (1876); *Leggett* v. *Stevens*, 185 N. Y. 70 (1906); *Seaward* v. *Davis*, 198 N. Y. 415, 92 N. E. 91 (1910); *Peck* v. *Smith*, 227 N. Y. 228, 125 N. E. 91 (1919); *Keefe* v. *Keefe*, 257 N. Y. 604, 178 N. E. 814 (1931). In the first two of the cited cases the legal life tenant had a qualified power, in the last three an absolute power.

[7] Appendix A, *infra*, p. 18.

[8] *Id.*, p. 19.

b. The Decision of the Court Below Has Raised Grave Doubt in the Minds of Members of the Bar Charged with the Responsibility of Drafting Wills as to the Conditions Required to Be Met by a Trust in Order to Qualify for the Marital Deduction.

The Court below, in concluding that the bequest to Mrs. Pipe did not qualify for the marital deduction under Section 812(e)(1)(F) because her power to invade and consume was deficient, stated:[9]

> "*During her lifetime* no restraint whatsoever is imposed upon her power to consume or dispose of the principal of her life estate as she wishes. She has a power to *consume*, but she may not devise or bequeath any unconsumed corpus at her death to beneficiaries of her own choice." (Italics as in the opinion below.)

The Court below is here stating that a trust for the surviving spouse will only qualify for the marital deduction if she has both an *inter vivos* and a testamentary power of appointment. This is clearly contrary to the statute, §812(e)(1)(F), which provides that possession of *either* power is sufficient, namely, of a power exercisable in favor of herself or in favor of her estate.[10]

The Senate Finance Report specifically states:[11]

> "If one such power is her only power, the requirement is met."

The Treasury Regulations[12] which discuss the five statutory conditions which must be satisfied for a trust to

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[9] *Id.*, pp. 17-18.

[10] Appendix B, *infra*, p. 24.

[11] Note 5, *supra*, at p. 17, 1948-1 Cum. Bull. at p. 343.

[12] Regulations 105, §81.47a(e).

qualify under §812(e)(1)(F),[13] state that the surviving spouse must have the power to appoint free of the trust exercisable in favor of herself or of her estate, and that such power must be exercisable by her alone and in all events. In order to meet these two conditions, the Regulations continue, the power must fall within *one* of the following categories:

(1) A power to appoint fully exercisable in her own favor at any time following her husband's death; or

(2) A power to appoint exercisable in favor of her estate; or

(3) A combination of both.

As an example under (1) the Regulations give "an unlimited power to invade" which is precisely the power which Mrs. Pipe had.

It seems clear that the Court below fell into error when it stated that a power in the surviving spouse to appoint to herself must include a power to bequeath, i.e. a power to appoint to her estate. However, until this question is resolved by this Court, members of the bar charged with the responsibility of drawing wills can not know whether §812(e)(1)(F) is to be interpreted literally, namely, to the effect that a trust will qualify for the marital deduction if, among other things, the surviving spouse has power to appoint the corpus free of the trust *either* to herself *or* to her estate, or whether, as the Court below appears to believe, a power to appoint to herself must be complemented by a power to bequeath.

[13] Appendix B, *infra*, p. 24.

The decision of the Court of Appeals for the Second Circuit conflicts with the decision of the Tax Court of the United States in *Estate of Ellis*, 26 T.C. 694 (1956), now pending in the Court of Appeals for the Third Circuit on respondent's appeal.

Petitioner recognizes that a conflict of this type is not literally within the examples set forth in Rule 19. Nevertheless, petitioner believes that the consequences of a conflict between the Tax Court and a Court of Appeals on a novel Federal tax question of broad general interest are sufficiently important to warrant a resolution thereof by this Court. The importance of such a conflict is emphasized by the Tax Court's recently announced position that it will disregard reversals by Courts of Appeals, if not convinced by the reasoning thereof because

> "* * * a court of national jurisdiction to avoid confusion should follow its own honest beliefs until the Supreme Court decides the point."[14]

As the Court below expressly recognized[15] its decision is based on an interpretation of the term "an unlimited power to invade" which is inconsistent with that adopted by the Tax Court of the United States in *Estate of Harry A. Ellis*, 26 T. C. 694 (1956). In the *Ellis* case the surviving spouse, who was the income beneficiary of a trust created under her husband's will, had power to invade principal in such amounts as she might require, it being expressly provided that she alone should be the judge of

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[14] *Arthur L. Lawrence*, 27 T. C. No. 82 (January 25, 1957), at page 5 (not yet officially reported).

[15] Appendix A, *infra*, p. 18, footnote 4.

how much should be required. The majority of the Tax Court interpreted these provisions as giving the widow an unlimited power to invade the corpus and held that the bequest qualified for the marital deduction under Section 812(e)(1)(F) of the 1939 Code.[16] In the instant case the Court below held that Mrs. Pipe's unlimited power to invade corpus during her lifetime was not broad enough to meet the statutory test. The respondent has filed a petition for review of the Tax Court's decision in the *Ellis* case with the Court of Appeals for the Third Circuit.

Counsel for petitioner, although in the nature of things they are not in possession of complete facts, have been informed by attorneys for a number of other estates that the identical issue involved in the *Pipe* case is presented in their cases which are either pending in the courts or before the Treasury Department. The same issue will doubtless be presented in the cases of still other taxpayers.

But the issue is of broader importance than the relatively narrow question presented by cases involving a legal life tenant. Until this Court speaks the bar will be left without a guidepost as to the scope of the power to appoint required to qualify for the marital deduction a devise or bequest to a surviving spouse, whether she be the income beneficiary of a formal trust, as was Mrs. Ellis, or a legal life tenant who under local law takes as a trustee, as did Mrs. Pipe. This question casts grave doubt on the adequacy of many existing wills to entitle the estate to the marital deduction.

The conflict between the Tax Court and the Court below with respect to an issue of such general importance should be settled promptly. It can only be settled by this Court.

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[16] The dissenting Tax Court judges stated (26 T. C. 694, 701) that this holding was difficult to reconcile with the Tax Court's earlier decision in the *Pipe* case.

Conclusion.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

RUSSELL D. MORRILL,
Counsel for Petitioner.

EDMUND W. PAVENSTEDT,
Of Counsel.

Appendix A.

Opinions Below.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 89—October Term, 1956.

(Argued December 11, 1956 Decided February 7, 1957.)

Docket No. 23748

ESTATE OF EDWARD F. PIPE, Deceased,
Nettie M. Pipe, Executrix,
Petitioner-Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

Before:

SWAN, MEDINA and WATERMAN,
Circuit Judges.

Petition to review a decision of the Tax Court, 23 T. C. 99, which held that decedent's bequest of a residuary estate to his widow for her life with power to use income and principal during her life in her uncontrolled discretion did not meet the conditions of Section 812(e) of the Internal Revenue Code so as to qualify for the so-called marital deduction. Affirmed.

EDMUND W. PAVENSTEDT (Russell D. Morrill, White & Case, of counsel), New York City, *for Petitioner-Appellant.*

CHARLES K. RICE, Asst. Atty. Gen. (Lee A. Jackson, Hilbert P. Zarky, Marvin W. Weinstein, Attys., Dept. of Justice, Washington, D. C.), *for Respondent-Appellee.*

WATERMAN, *Circuit Judge:*

Edward E. Pipe deceased on September 20, 1948 domiciled in the State of New York. He was survived by his widow, Nettie M. Pipe, who became executrix of his estate. The executrix petitions us, pursuant to sections 7482 and 7483 of the 1954 Internal Revenue Code, to review a Tax Court decision reported in 23 T. C. 99 (1955). This decision holds that the decedent's estate tax was overpaid in the amount of $114.76, but since the Tax Court took into account a sum of $19,310.29 deposited by taxpayer solely to stop the running of interest, the determination actually was a finding of an estate tax deficiency in the amount of $19,195.53. This deficiency results from the denial by the Commissioner of a deduction of $141,473.55 claimed under section 812(e) of the Internal Revenue Code of 1939, as amended in 1948. The deduction was sought with respect to a bequest by decedent to his surviving spouse of a legal life estate in personalty that had been valued for federal estate tax purposes at $217,429.84, coupled with unlimited powers in the widow to invade during her lifetime, but with remainders over to named legatees as to any residue left at her death.

The pertinent provisions of the will are as follows:

> "THIRD: All the rest, residue and remainder of my estate, of whatsoever nature and wheresoever situated, hereinafter referred to as my 'residuary estate,' I give, devise and bequeath to my wife, Nettie M. Pipe, to have and to hold the same for the term

of her natural life, with full power to use, enjoy, sell or dispose of the income and principal thereof, or any part thereof for such purposes or in such manner, as she in her uncontrolled discretion may choose, it being my desire to place no restraint on her in any respect concerning the absolute right of full disposition and use of the whole or any part of said income or principal of my residuary estate, except that she shall have no power over the disposition of such part thereof as remains unexpended at the time of her death.

"I direct that my said wife shall not be required to file any bond or other security for the protection of any remainderman interested in my said residuary estate, and she shall not be limited in investing and reinvesting the same to securities of the kind authorized by law for the investment of trust funds. During the life of my said wife, any stocks, bonds or other securities may be registered in the name of my said wife alone as if she were the absolute owner of such property, and no one dealing with her with respect to my residuary estate shall be responsible for the application of any proceeds of sale or other disposition of property.

"FOURTH: On the death of my said wife * * * I give and bequeath all * * * of the property which can be identified at my wife's death as a part of my residuary estate * * * absolutely, to [certain named legatees]."

I

The appellant's first principal contention is that this bequest qualifies for the so-called marital deduction under subsection 812(e)(1)(A) of the 1939 Code inasmuch as the life tenancy it creates is equivalent to absolute ownership of the principal of the bequest. Appellant relies on section 149 of the New York Real Property Law, which is

also applicable to personal property. *In re Dean's Estate*, 166 Misc. 499, 2 N. Y. S. 2d 757 (1938). Section 149 provides:

> "Where an absolute power of disposition, not accompanied by a trust, is given to the owner of a particular estate for life or for years, such estate is changed into a fee absolute in respect to the rights of *creditors*, purchasers and incumbrancers, but subject to any future estates limited thereon, in case the power of absolute disposition is not executed, and the property is not sold for the satisfaction of debts."

It is argued that under the law of New York this particular bequest created a fee absolute interest in the widow and that New York law determines the legal characterization of the bequest because the testator died domiciled in New York.

The appellant argues that the person who has a fee in respect to the rights of his creditors under section 149 has a fee for all practical purposes. This position is untenable, however, because one of the most significant elements of absolute ownership is the power of the owner to determine to whom the property shall pass upon his death. Section 149 specifically protects the interests of remaindermen limited after a life tenancy in the event the life tenant does not fully dispose of the property *during his lifetime*. Since Mrs. Pipe cannot make a testamentary disposition of any part of this estate, her interest is not converted into a fee simple absolute by section 149.[1] *Terry* v. *Wiggins*, 47 N. Y. 512 (1872); *In re Alimann's Will*, 128 N. Y. S. 2d 204 (1953).

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[1] Nor does §149 change the estate given to a grantee with a power of disposition during lifetime into a fee absolute for purposes of New York state taxes. *In re Sonnenburg's Estate*, 133 Misc. 42, 231 N. Y. S. 191 (1928).

II

The appellant's second main contention is that this bequest, if it does not convey a fee simple absolute, qualifies for the marital deduction under subsection 812(e)(1)(F), which provides:

> "*Trust with Power of Appointment in Surviving Spouse.*—In the case of an interest in property passing from the decedent in trust, if under the terms of the trust the surviving spouse is entitled for life to all the income from the corpus of the trust, payable annually or at more frequent intervals, with power in the surviving spouse to appoint the entire corpus free of the trust (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the corpus to any person other than the surviving spouse—
>
> (i) the interest so passing shall, for the purposes of subparagraph (A), be considered as passing to the surviving spouse, and
>
> (ii) no part of the interest so passing shall, for the purposes of subparagraph (B)(i), be considered as passing to any person other than the surviving spouse.
>
> This paragraph shall be applicable only if, under the terms of the trust, such power in the surviving spouse to appoint the corpus, whether exercisable by will or during life, is exercisable by such spouse alone and in all events."

The appellant argues that this subsection was intended to embrace not only express trusts but also those bequests that are treated as trusts under the applicable state law, here the local law of New York. Reference is made to a

number of New York cases holding that a legal life tenant, even if vested with an unqualified power to invade and consume the corpus during his lifetime, holds the principal of his estate in trust as a "trustee" for the named remaindermen.[2] But since subsection 812(e)(1)(F) also requires that the trust be coupled with a power of appointment, appellant cannot rest on these cases alone. It is necessary, in addition, to equate Mrs. Pipe's power to invade and consume the principal with a general power of appointment, as that term is used in the 1939 Code. Apparent support for the proposition that the equivalent of such a power is present here can be found in U. S. Treasury Regulation 105, §81:24,[3] which defines a power of appointment in the following manner:

> "The term 'power of appointment' includes all powers which are in substance and effect powers of appointment regardless of the nomenclature used in creating the power and regardless of local property law connotations. For example, if a transfer in trust provides that the beneficiary may appropriate or consume the principal of the trust, such power to consume or appropriate is a power of appointment."

But even assuming, *arguendo*, that the bequest at bar did create a "trust" under the law of New York that would comply with the minimal requirements of subsection 812 (e)(1)(F), we must hold that it does not qualify for the marital deduction under that section. We cannot do otherwise, for a reading of this statutory provision and its apposite Treasury Regulations in their entirety make it clear that Mrs. Pipe's power to invade and consume is not the type of "unlimited power to invade" referred to in the Regulations. See U. S. Treas. Reg. 105, §81.47a. *During her lifetime* no restraint whatsoever is imposed upon her

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[2] E.g., *Keefe* v. *Keefe*, 257 N. Y. 604, 178 N. E. 814 (1931); *Peck* v. *Smith*, 227 N. Y. 228, 125 N. E. 91 (1919); *Seaward* v. *Davis*, 198 N. Y. 415, 92 N. E. 1107 (1910).

[3] See also *Estate of Ellis*, 26 T. C. No. 85 (1956).

power to consume or dispose of the principal of her life estate as she wishes. She has a power to *consume*, but she may not devise or bequeath any unconsumed corpus at her death to beneficiaries of her own choice. Thus her power under the terms of Mr. Pipe's will is not the "unlimited power to invade" referred to in the Regulations, because to comply with that requirement, the "power in the surviving spouse must be a power to appoint the corpus to herself as unqualified owner or to appoint the corpus as a part of her estate, that is, in effect, to dispose of it to whomsoever she pleases." U. S. Treas. Reg. 105, §81.47a. Or, in the language of the statute itself, the surviving spouse must be able to appoint the entire corpus "free of the trust" to herself or her estate. This Mrs. Pipe cannot do, because as long as any of the corpus of her estate remains, it will be held "in trust" for the named remaindermen.[4]

III

Lastly, the appellant argues that the disallowance of a deduction for this bequest would frustrate the clear intent of Congress in enacting the marital deduction provisions in 1948. Citing extensive legislative history, *e.g.*, S. Rep. No. 1013, 80th Cong., 2d Sess. (1948), the appellant points out that Congress sought a general uniformity of tax treatment of decedents' estates in both community property and common law states.[5] The method adopted, in general, was to permit a deduction from the gross estate of the spouse who first deceased, for the value of property that would be included, if not consumed, in the gross estate of the sur-

[4] *Estate of Ellis*, 26 T. C. No. 85 (1956), where the decedent died domiciled in Pennsylvania, although distinguishable from the case at bar because it dealt with an express trust, asserts a position as to the meaning of "an unlimited power to invade" inconsistent with that here adopted. To the extent that the two decisions are irreconcilable, we approve the analysis set forth in the dissent in that case.

[5] See also *Hamrick* v. *Pitts*, 135 F. Supp. 835, 837 (W. D. S. C.), *aff'd*, 228 F. 2d 486 (4th Cir. 1955); *Weyenberg* v. *United States*, 135 F. Supp. 299, 301 (E. D. Wis. 1955).

viving spouse, thereby subjecting the value of that property so deducted to only one estate tax, which would be exacted at the survivor's death. Mrs. Pipe argues that the unconsumed principal of her life estate will be included in her gross estate for federal tax purposes because of her unqualified power to invade the corpus during her lifetime. It is not necessary for us, however, to determine the validity of this contention, because the possibility of double taxation is not a sufficient basis for allowing a marital deduction if the bequest does not comply with the specific statutory requirements of section 812(e). *Starrett* v. *Commissioner*, 223 F. 2d 163 (1st Cir. 1955). Cf. *Estate of Shedd* v. *Commissioner*, 237 F. 2d 345 (9th Cir. 1956); *Estate of Hoffenberg* v. *Commissioner*, 22 T. C. 1185 (1954), *aff'd per curiam*, 223 F. 2d 470 (2d Cir. 1955). Here the appellant has failed to prove that this bequest falls within any of the express provisions for marital deductions under the 1939 Code.

Affirmed.

SWAN, *Circuit Judge* (dissenting):

Nearly a century ago the Supreme Court speaking through Chief Justice Taney, declared in *United States* v. *Boisdore's Heirs*, 8 How. 113, 121: "In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." This was quoted with approval as recently as February 1956 in *Mastro Plastics Corp.* v. *Labor Board*, 350 U. S. 270, 285, which in turn was quoted on this point in *Labor Board* v. *Lion Oil Co.*, 352 U. S. 282, 288 (Jan. 22, 1957). The object and policy of the marital deduction provisions of section 812(e) are, as stated in *Estate of Ellis*, 26 T. C. 694, "to remove as far as possible the discrimination with respect to estate taxes between decedents of community property states and those of non-community property states." One of the provisions enacted to accomplish this object was section 812(e)(1)(F) quoted in the majority opinion. In discussing this

subparagraph, the Senate Finance Committee Report stated:

> "These provisions have the effect of allowing a marital deduction with respect to the value of property transferred in trust by or at the direction of the decedent, *where the surviving spouse, by reason of her right to the income and a power of appointment, is virtually the owner of the property.* This provision is designed to allow the marital deduction for such cases *where the value of the property over which the surviving spouse has a power of appointment will (if not consumed) be subject to either the estate tax or the gift tax in the case of such surviving spouse.*" [Italics added.][1]

Bearing in mind the canon of construction approved by the Supreme Court in the cases cited above, I think subparagraph (F) should not be interpreted so literally as to preclude the marital deduction, where, as in the present case, the widow has a life interest in the deceased husband's residuary estate, an unlimited power to appoint the principal to herself, and is by local New York law constituted a trustee for the remaindermen of unconsumed principal.[2]

In *Estate of Ellis, supra,* decided subsequently to the case at bar, the decedent's will left the residue of his estate in trust, all income payable to his widow for life. The widow also received the power to invade corpus if she should so require, she to be the sole judge as to how much she should require. At her death principal remaining was payable one-half to her estate and one-half to their chil-

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[1] Sen. Rep. 1013, 80th Cong. 2d Sess., Part 2, p. 16 (1948); 1948-1 Cum. Bull. 285, 242.

[2] In *Weyenberg* v. *United States* (E. D. Wis.), 135 F. Supp. 299 at 301, the court said, after stating that the purpose of the marital deduction provisions was to equalize the federal estate tax between citizens of common law states and citizens of community property states, "The method of equalization was to some extent left up to the individual states."

dren. The Tax Court held that the bequest qualified for the marital deduction under section 812(e)(1)(F). In reaching this conclusion the court interpreted the will as giving the widow an unlimited power to consume the corpus. Mrs. Pipe as life tenant was given equal power. The court also accepted as correct the petitioner's contention that the value of any part of the trust corpus unconsumed at the widow's death would be includible as a part of her estate for purposes of the estate tax. In *Estate of Pipe* the petitioner makes the same contention. The court further held that Mrs. Ellis by reason of her unlimited power to invade and consume principal could exhaust the trust corpus "and thereby destroy the remainders." This is equally true of Mrs. Pipe.

The majority opinion in *Estate of Ellis* attempts to distinguish *Estate of Pipe* on two grounds neither of which do I find persuasive. It says, first, that in *Estate of Pipe* the devise was "*direct*, and not in trust," of a legal life estate to the surviving spouse, and "Section 812(e)(1)(F) is clearly limited to trusts." This seems a purely formal distinction and inconsistent with the purpose of the statute.[3] As already noted the two widows had precisely the same powers to invade the corpus, and by consuming the entire corpus to destroy the remainders. And any unconsumed corpus at the widow's death would be treated as part of her estate for estate tax purposes.

The second suggested distinction is that *Estate of Pipe* held, without actually passing on the petitioner's contention that a trust existed, "that even if there was such a

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[3] It is expressly rejected in section 2056(b)(5) of the 1954 Code as to decedents dying after August 16, 1954. See also Senate Rep. No. 1622, 83rd Cong. 2d Sess., Part 2, 125 (1954):

> "A marital deduction is allowed in computing the taxable estate under present law for the value of property passing from one spouse to the other, if the surviving spouse has a right to the income from all of the property and has a general power of appointment over all of it. However, present law requires in such cases that the property be placed in 'trust' and *because of doubt under the law of the various States as to what constitutes a 'trust' it is not clear when a legal life estate will qualify as a trust.*" [Italics added.]

trust, it would apply only to principal remaining unconsumed at death of the life tenant, and that the principal of such a 'trust' is too indefinite to permit us to assign any value thereto for purposes of the marital deduction." But precisely the same objection existed in the case of the formal trust created by the will of Mr. Ellis. At the time of his death no one could foretell how much, if anything, would be left of the corpus of the trust at the death of Mrs. Ellis. If such indefiniteness does not prevent a formal trust from qualifying for the marital deduction, I see no reason why it should not be equally immaterial in the present case.

Judge Opper, who wrote the *Pipe Estate* opinion found it difficult to reconcile that decision with *Estate of Ellis* and dissented in the latter case. My brothers agree with his dissent rather than with the majority. I am unable to do so. In my opinion the marital deduction in the case at bar should be allowed under §812(e)(1)(F).

Appendix B.

Statute Involved.

Internal Revenue Code of 1939:

SEC. 812. NET ESTATE.

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

* * *

(e) BEQUESTS, ETC., TO SURVIVING SPOUSE.—

(1) ALLOWANCE OF MARITAL DEDUCTION.—

(A) In General.—An amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

(B) Life Estate or Other Terminable Interest.—Where, upon the lapse of time, upon the occurrence of an event or contingency, or upon the failure of an event or contingency to occur, such interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed with respect to such interest—

(i) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and

(ii) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse;

and no deduction shall be allowed with respect to such interest (even if such deduction is not disallowed under clauses (i) and (ii))—

(iii) if such interest is to be acquired for the surviving spouse, pursuant to directions of the decedent, by his executor or by the trustee of a trust.

For the purposes of this subparagraph, an interest shall not be considered as an interest which will terminate or fail merely because it is the ownership of a bond, note, or similar contractual obligation, the discharge of which would not have the effect of an annuity for life or for a term.

* * *

(F) Trust with Power of Appointment in Surviving Spouse.—In the case of an interest in property passing from the decedent in trust, if under the terms of the trust the surviving spouse is entitled for life to all the income from the corpus of the trust, payable annually or at more frequent intervals, with power in the surviving spouse to appoint the entire corpus free of the trust (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the corpus to any person other than the surviving spouse—

(i) the interest so passing shall, for the purposes of subparagraph (A), be considered as passing to the surviving spouse, and

(ii) no part of the interest so passing shall, for the purposes of subparagraph (B) (i), be considered as passing to any person other than the surviving spouse.

This paragraph shall be applicable only if, under the terms of the trust, such power in the surviving spouse to appoint the corpus, whether exercisable by will or during life, is exercisable by such spouse alone and in all events.

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